SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1191

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, and AETNA INSURANCE COMPANY,

Petitioners,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated December 3, 1974, docketed February 3, 1975.

Opinions Below

The opinion of the District Court of the Southern District of New York is reported at 372 F. Supp. 859. It is printed in Appendix A hereto. Judgment of the District Court is printed in Appendix B.

The opinion of the Court of Appeals as modified is reported at 507 F 2nd 68. It is printed in Appendix C hereto. The order of the Court of Appeals modifying its opinion on rehearing is printed at Appendix D hereto.

The order of the Court of Appeals denying rehearing in banc is printed at Appendix E hereto.

Jurisdiction

The jurisdiction of the District Court was invoked pursuant to the Judiciary Act 28 U.S.C. Sec. 1333.

The judgment of the Court of Appeals for the Second Circuit was made December 3, 1974 and docketed February 3, 1975 (printed at Appendix F hereto). The order of the Court of Appeals modifying its decision on rehearing was made and entered December 20, 1974. The order of the Court of Appeals denying petitioners' application for a rehearing in banc was made and entered January 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

In Re Weyerhaeuser.

1. Does a carrier guilty of gross negligence or wilful misconduct in providing a known unseaworthy vessel nevertheless enjoy the protection of limitation clauses in the contract of carriage and in the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5) ("COGSA")?

2. Does a common carrier who misrepresents to the shipper that his vessel is seaworthy and that he has exercised due diligence to make it so have a limitation of liability under the Carriage of Goods by Sea Act for resulting cargo damage?

3. If questions #1 and #2 are answered in the affirmative, does § 1304(5) of the COGSA (as interpreted) vio-

late petitioners' rights under Amendment V of the United States Constitution?

4. Does a common carrier who wilfully fails to preserve cargo from damage during the voyage have a limitation of liability under the COGSA?

IN RE NEW YORK NAVIGATION.

5. Does the ruling by the Supreme Court in *Herd & Co.* v. *Krawill Machinery Corp.* (1959) 359 US 297, 79 S Ct. 766, 3 L.Ed. 2d 820 that COGSA applies only to the carrier bind the lower Federal Courts?

Statutes Involved

Amendment V, United States Constitution	See	Appendix	G
28 U.S.C. § 1254(1)	"	"	"
28 U.S.C. § 1333	"	"	"
46 U.S.C. § 1301(a) (b)	"	"	"
46 U.S.C. § 1302	"	"	"
46 U.S.C. § 1303(8)	"	"	"
46 U.S.C. § 1304(1),(5)	"	"	"
New York Uniform Commercial Code § 7-309	"	"	"

Statement

Invoking the admiralty and maritime jurisdiction of the United States, petitioners, Iligan Steel Mills, Inc., et al ("Iligan") instituted suit in the Southern District of New York against New York Navigation Company, Inc., ("New York Navigation"), the charterer of the SS John Weyerhaeuser, and Weyerhaeuser Company ("Weyerhaeuser"), her owner and the carrier involved, for seawater damage to Iligan's cargo, occurring during a voyage from Baltimore to the Philippines. The damage was approximately $2,200,000.00.

Iligan required ships to transport its steel mill to the Philippines. On July 11, 1966 it and New York Navigation entered into a contract of affreightment (App. 1)* whereby the latter agreed to "provide . . . suitable and seaworthy vessels . . .".

This express warranty is the first sentence of Clause 1 of the agreement. Clauses 2 through 10 cover freight rates and other technical details. Clause 11 reads in part:

> "*In all other respects the loading and transportation* herein shall be performed in accordance with New York Navigation's standard bill of lading. . . ." (Emphasis supplied)

Both Courts below ignored the clear intention of the parties that the bill of lading or Carriage of Goods by Sea Act were not to bear upon the express warranty of seaworthiness.

The Master was to sign bills of lading; The United States Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* ("COGSA") was to apply to the "carrier"; but the contract of July 11, 1966 itself was to be governed by New York law.

The first ship provided was the SS John Weyerhaeuser, owned by Weyerhaeuser, which issued the bill of lading on December 16, 1966. The bill of lading provided that it was a contract only with the shipowner and New York Navigation was to have no responsibilities thereunder and it contained a definition of carrier which excluded New York Navigation. Petitioners' cargo was loaded on or about December 16, 1966, at which time the ship was already unseaworthy and leaking. Respondent Weyerhaeuser built a temporary wooden non-watertight bulkhead between holds #2 and #3 in anticipation of the loading at Tampa of a full load of fertilizer into hold #3.

Both Courts below found that the cause of the cargo damage was "a massive entry of water into the ship's #3

* Exhibit Volume.

hold, which slowly permeated the fertilizer [stowed in that hold], and formed a slurry, and finally burst through the [temporary] non-watertight bulkhead into the #2 hold inundating and destroying the Iligan cargo". 372 F. Supp., at p. 863.

The entry of seawater was due to a long-standing defect in a soil pipe which exited through the ship's hull after passing through the cargo hold. "The [valve] lugs were completely corroded with rust, so that the valve was frozen in an open position, and the sanitary line pipe was corroded through with a hole approximately 2" by ¼"", (507 F. 2d 69, 70) through which the sea entered the cargo hold.

Both lower Courts found that the Master of the ship knew of the leak three voyages before the "Iligan" voyage; that he reported it to Weyerhaeuser's marine superintendent in October, 1966, so the carrier's shoreside owners had notice of "excessive water entry" into hold #3 *two months prior to the relevant voyage.* (372 F. Supp., at p. 865).

There is a serious inconsistency in the findings of fact of the lower Courts. On the one hand, it was found that "the signals were sufficiently clear to put the owner on notice that there was some problem with water entry"; that it was an "unusual problem"; that the owner "had notice of the problem of excessive water entry" (372 F. Supp. at pp. 865, 868) and at Cristobal, the ship was "clearly unseaworthy" and "taking on significant quantities of water" and the master's explanations at that time were "wholly implausible" (372; F. Supp. at p. 865). "In Baltimore for several days, the bilge readings were abnormally high" (372 F. Supp. at p. 863).

On the other hand, the lower Courts held that petitioner "has not proved that Weyerhaeuser knew or must have

known of the unseaworthy condition of the ship" because the master did not have knowledge of the "actual defect" (372 F. Supp. at 865).

Although it had expressly warranted the ship would be seaworthy and was subject to an implied warranty as well, New York Navigation did nothing to provide a seaworthy ship but delegated its duty to Weyerhaeuser.

Weyerhaeuser remained silent about the defect, never advised Iligan and never repaired it. The Master and Mr. Best, Iligan's representative, met at Baltimore on the ship's bridge. There was not a word about the leak (App. 117a, 118). Iligan's cargo was loaded into a hold certain to flood (App. 555a). Best would not have accepted the ship had he known the truth (App. 117a, 118a).

The ship was delayed at Cristobal for 16 days. The Master knew then the ship was "clearly unseaworthy" as significant quantities of seawater were entering #3 hold. No. 2 hold was still dry and Iligan's cargo could have been preserved if it had simply been discharged at that port. But still nothing was done.

The District Court held that Weyerhaeuser's failure to locate and correct the defect was a simple failure of due diligence, and held it liable to Iligan but only for $500.00 per package under § 1304(5) of the United States Carriage of Goods by Sea Act.*

As for New York Navigation the District Court held it had breached its express warranty of unseaworthiness but since it had incorporated by reference the United States

* The trial was held before Honorable Edward C. McLean, who died shortly after receiving post-trial briefs. Honorable Robert J. Ward, by stipulation, decided the case on the record.

Carriage of Goods by Sea Act, 46 USC § 1300, *et seq.* in its contract with Iligan it was liable only for $500.00 per package. It held COGSA did not apply by law to New York Navigation but that it had been incorporated although Weyerhaeuser was the carrier, and not New York Navigation.*

The lower Court held that a breach of an express warranty to supply seaworthy ships did not nullify the contract. But if it did, petitioner had to treat the entire contract as void, or else the terms of the contract were not voided.

But this was a comprehensive contract which envisioned the issuance of many different bills of lading as different vessels were provided for different parts of the steel mill. Each new bill of lading became part of the contract and each new ship became subject to new warranties. Under New York law which governed the agreement, it was severable. *Riply* v. *International Railways of Central America and United Fruit Co.*, (1960) 8 NY 2d 430, 209 N.Y.S. 2d 289, 171 N.E. 2d 443.

Petitioner does not seek to nullify selected terms of the contract, as the lower Court held, but simply argues that the commercial purpose of an entire divisible part of a severable contract has been frustrated by New York Navigation's fundamental breach of that part.**

The District Court also held that New York Navigation, which did not even inspect the ship, had exercised due diligence by delegating its duty to Weyerhaeuser.

The Second Circut affirmed the District Court's judgment and went further by holding that the concept of

* The bill of lading stipulated New York Navigation had no duties under it and it was not the carrier.

** Article 16 of the agreement stipulates that performance under it shall continue in the event of arbitration of a dispute. Therefore, the parties meant it to be divisible.

deviation set forth in *The Willdomino* (1927) 272 U.S. 718, S. Ct. 261, 71 L. Ed. 491 and *St. Johns N.F. Shipping Corp.* v *S. A. Compagnia Geral Commercial* (1923) 263 U.S. 119, 44 S. Ct. 30, 68 L. Ed. 201, would not be applied to any other breach of contract by a common carrier; that no matter how the carrier causes cargo damage, either through gross negligence or even wilfully, it is liable only for $500.00 per package. Because of prior Supreme Court decisions it reluctantly allows that a geographical deviation or wrongfully stowing the cargo on deck, will void the contract of carriage, *but nothing else.*

It affirmed the judgment against New York Navigation; limited to $500.00 per package, without opinion.

28 U.S.C.A. § 2403 may be applicable.

Reasons for Granting the Writ

1. The Court of Appeals has not followed the rulings of this Court and the House of Lords that a carrier's gross negligence or wilful misconduct will void its contract and is a valid concept in the law. *The Willdomino* (1927) 272 U.S. 718 47 S. Ct. 261, 71 L. Ed. 491; *The Malcolm Baxter, Jr.* (1928) 277 U.S. 323, 48 S. Ct. 516, 72 L. Ed. 901; *Monarch SS Co. Ltd.* v. *Karlshamus Oljefabriker (A/B)* [1949]A. C. 196.

2. The Court of Appeals has granted a limitation of liability to a carrier whose bill of lading was based upon a misrepresentation (by failure to speak) as to the seaworthiness of his vessel and his exercise of due diligence.

3. The Court of Appeals has not followed the ruling of this Court that a carrier who wilfully exposes the goods to a greater risk than has been agreed becomes liable as for a deviation and cannot escape by reason of any limitation of liability in its contract.

4. The Court of Appeals has granted a statutory limitation of liability to a carrier who wilfully failed to preserve the cargo from inevitable damage during the voyage.

5. By giving Weyerhaeuser the benefit of § 1304(5) of the United States Carriage of Goods by Sea Act, under the facts herein, the Court of Appeals has violated Iligan's rights under Amendment V of the United States Constitution.

6. The Court of Appeals has not followed the ruling of this Court that the United States Carriage of Goods by Sea Act applies only to carriers.

7. The questions presented are of wide international concern to and a subject of serious disagreement in the shipping industry.

1. In *The Willdomino* (1927) 272 U.S. 718, (supra) a ship left port with an inadequate supply of coal, known to be so by the carrier, and this necessitated a departure from her course. During the deviation the ship struck a reef or a submerged object which caused seawater damage to the cargo. This Court held that the unseaworthiness was the cause of the damage and since it was known to the carrier at the time of shipment the contract had to fall.

In *The Malcolm Baxter, Jr.*, (1928) 277 U.S. 323, (supra), a schooner developed leaks at sea from a cause existing at the port of departure, which the carrier failed to discover from a lack of due diligence. This necessitated her putting into a port of refuge. While there, an embargo frustrated the planned voyage. The Court found that the facts of the case distinguished it from *The Willdomino* and that the holding of *The Willdomino* case was not applicable. The Court held that while the carrier would be responsible for its failure to discover the unseaworthy condition the facts demonstrated that its neglect was not of a sufficient

degree of culpability to warrant displacement of the contract; the carrier was therefore permitted to recover its freight. The Court did point out at page 331 however:

> "Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by it."

In dealing with the damage caused by the embargo, the Court noted at 334:

> "There is no finding, nor is it suggested, that at the time when the contract of affreightment was entered into, or when the vessel broke ground, the embargo could reasonably have been foreseen, or that there were any special circumstances charging petitioners with the knowledge or consequent delay would bring the vessel within its operation".

This quote is extensively discussed by the House of Lords in *Monarch SS Co. Ltd.* v. *Karlshamus Oljefabriker (A/B)* [1949] A.C. 196.

In that case plaintiff chartered defendant's British vessel to carry soybeans from Manchuria to Sweden. Because of delay caused by unseaworthiness, the vessel was at sea when war broke out between England and Germany. The ship came under Admiralty orders and had to discharge the cargo at Glasgow. Plaintiff sued for the cost of transshipment on a neutral vessel and defendant relied on a war risk clause in the charter party.

The House of Lords agreed with the decision of the Supreme Court of the United States in *The Malcolm Baxter, Jr., supra,* but held it had left open the question whether, if the carrier in that case should have foreseen the embargo, it would have lost its exemptions. It held the carrier should have foreseen the outbreak of war and the contract was therefore displaced.

These cases demonstrate that actual knowledge or knowledge chargeable to the carrier that his ship is unseaworthy is the key factor which strips the carrier of the protection afforded to him by his contract and makes him liable as an insurer. What a shipowner should have known is sufficient to establish his fault or privity, design and neglect in both fire and limitation cases. *The Pocone* (Judge L. Hand), (2 Cir. 1947) 159 F. 2d 661, cert den. (1947) 331 U.S. 836, 67 S. Ct. 1519, 91 L. Ed. 1849.

At pages 664-5 Judge Hand said:

> "The measure in such cases is not what the owner knows, but what he is charged with finding out".

The Court of Appeals took out of context the District Court's finding that Iligan had not proved that Weyerhaeuser knew or must have known of the unseaworthy condition of the ship (372 F. Supp. at p. 865; 507 F. 2d at p. 70). The Court's error is amply demonstrated by the findings of the District Court that Weyerhaeuser's shoreside officers had "notice of the problem of excessive water entry" (372 F. Supp. at p. 868); that "signals were sufficently clear to put the owner on notice that there was some problem with water entry" (372 F. Supp. 865); and that the shipowner's shoreside officers "failed to conduct an adequate inspection to locate and correct the defect" (372 F. Supp. at p. 868). The carrier, therefore, knew that hold #3 was leaking sea water, but never ascertained the exact cause. The circumstances made such discovery imperative. Prior to the voyage in question, while the vessel was at Portland, internal fresh water leaks as well as the ship's plates, were eliminated as possible sources of water entry. Thus, the clapper valve was the most likely cause of sea water entry as this problem was common on old Liberty ships.

The Court of Appeals decision is a flat holding that wilful misconduct or gross negligence will in no event prevent the carrier from limiting liability.

The Court's language 507 F. 2nd at page 70 demonstrates that it was promulgating a policy designed to eliminate once and for all times cargo suits which would require judicial consideration of the degree of culpability of a shipowner. The Court concluded that the determination of gross negligence is too difficult for them to decide, and the Court proposes that it would be preferable instead for cargo insurers rather than the ship's insurers to bear the risk in such cases. In formulating this doctrine, the Court of Appeals has apparently overlooked the fact that the decisions of this Court in *The Willdomino (supra)* and *The Malcolm Baxter (supra)* have set the guidelines for determining the precise question which the Court of Appeals has precluded as an issue from all future cases. In *The Waalhaven* 36 F 2nd 706 (2nd Cir. 1929) cert. denied 281 U.S. 747, 50 S. Ct. 352, 74 L. Ed. 1159, Judge L. Hand speaking for the Court made reference to the holding in *The Willdomino* at page 709:

> "We do not forget that in The Willdomino the Supreme Court added that "gross negligence" might be enough; but this we understand to mean no more than that the facts may be so clear as to compel the inference that the master closed his eyes to them, and knew, though he may not have explicitly acknowledged, that he must change his route. The distinction between this and a deliberate intention seems to us very tenuous."

In *President Arthur*, (S.D.N.Y. 1928) 28 F. 2d 391, the Court followed *The Willdomino (supra)*:

> "The ship left port with bunker coal grossly inadequate for the voyage, and this fact *must have been known* to her responsible officers before sailing. The deviation to Halifax cannot, therefore, be regarded as involuntary. The emergency which required deviation arose either from gross negligence or deliberate intention in failing to take on board sufficient bunker coal for the voyage". (emphasis supplied)

If the Court of Appeals in the present case had followed *The Willdomino (supra)* rather than the rule which it formulated, it is clear that the appellate court could not have sustained the determination of the District Court. Respondent Weyerhaeuser knew that there had been an entry of an excessive amount of water. The District Court relieved the carrier from liability on the theory that its failure to know the exact cause of the water entry was mere negligence. This conclusion is not compatible with the carrier's deliberate or wanton failure to have the ship properly inspected when it had been forwarned of the unseaworthy condition. By removing entirely the question of degree of the carrier's negligence in cases of this nature the Court of Appeals has in effect overruled the decisions of this Court and has thereby given binding effect to an otherwise invalid contract of carriage.

2. The Court of Appeals found that Weyerhaeuser's shoreside officers knew two months before Iligan's cargo was loaded that hold #2 (common to hold #3) which was to contain Iligan's cargo, was suffering "excessive water entry". Yet this information was not relayed to Iligan which was allowed to accept the bill of lading for this unseaworthy ship.

Mr. Best, the shipper's agent, talked to Captain Dumble on the bridge of the SS JOHN WEYERHAEUSER in Baltimore,

before Iligan's cargo was loaded. The water in hold #2 at that time, to the Captain's knowledge, was to the top of the bilges (App. 117a, 118a).

They each knew who the other person was, yet the Captain remained silent (App. 117a, 118a). Nor did Weyerhaeuser's main office contact petitioner to advise it of the condition. Mr. Best testified that if he had known of the leak, he wouldn't have accepted the ship (App. 117a, 118a).

If Iligan had employed the SS JOHN WEYERHAEUSER after learning of its unseaworthiness, its cargo insurance policy would have lapsed. Its "seaworthiness admitted" clause covers only innocent parties and not shippers who have learned of defects.

In accordance with general practice the shipper relies upon the carrier with regard to the condition of the ship. The carrier is fully aware of this reliance. Respondent Weyerhaeuser knew that the shipper Iligan had no knowledge of the water entry.

This failure to speak when there was a duty to speak was tantamount to fraud under the circumstances, 12 Williston on Contracts (3rd Ed.) Sec. 1497 at 380. The Court of Appeals allowed to the carrier a limitation of liability of $500.00 per package. However, COGSA applies only to contracts of carriage. Since there was no true meeting of the minds, this carrier cannot have the benefit of COGSA.

The Court below failed to follow its own ruling in *Oliver Straw Goods Corp.* v. *OSK* (2 Cir. 1931) 47 F. 2d 376. In that case, the carrier issued a bill of lading which falsely stated the goods were on board. As a matter of fact they were still ashore where they were looted following an earthquake. Judge Augustus Hand held on p. 379:

> ". . . to effectuate the valuation clauses through the fiction of estoppel would be to enable the shipowner to profit by its own wrong".

Judge Hand classed the breach of the on-board warranty as a deviation no less fundamental than a deviation in the voyage or on-deck, etc. (p. 380).

From the earliest days of the common law and the general admiralty law a contract obtained by fraud has been void. Cases of constructive fraud lead to the same result, 12 Williston on Contracts (supra) Sec. 1509 at page 455 and quoting at page 456 from *Lehigh Zinc & Iron Co.* v. *Bamford* (1893) 150 U.S. 665.

3. The Court of Appeals has refused to follow the ruling of this Court in *St. Johns N.F. Shipping Corp.* v. *S.A. Compania Geral Commercial* (1923) 263 U.S. 119 44 S. Ct. 30, 68 L. Ed. 201 that a carrier who breaks his contract by exposing the goods to a greater risk than had been agreed does not have the benefit of exculpatory or limiting clauses in that contract.* The ruling of that case is that a carrier may not increase the risk anticipated without being *fully* liable for resultant losses. The Court of Appeals has limited the holding in *St. John* to on-deck deviations. Mr. Justice Mc Reynolds in deciding *St. Johns* cited in support of his ruling *The Sarnia* (2nd Cir. 1921) 278 Fed. 459 cert. den. (1922) 258 U.S. 625.

This Court sets policy for the nation. Its decisions cannot be so narrowly construed as has here been done.

By knowingly stowing Iligan's cargo in a hold which was leaking, Weyerhaeuser knowingly increased the risk of loss. Captain De Bouthillier, Iligan's expert, testified,

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* In St. Johns, the carrier wrongfully stowed goods on-deck, and they had to be jettisoned during a storm.

without contradiction, that the damage was "certain" (App. 556a). This is even more serious than on-deck stowage, which requires heavy seas to damage the cargo.*

It is submitted that the *St. John's* doctrine is not limited to the bare facts of the case but rather sets a policy of broad application. If the decision of the Court of Appeals is permitted to stand, the carrier will be given protection for its wrong doing that this Court has clearly stated it will not sanction.

4. The District Court found that "the ship was clearly unseaworthy in Cristobal", because it "was taking on significant quantities of water which were at that time confined to the #3 hold and the Captain's explanations for the high bilge readings were "wholly implausible" at that time (372 F. Supp. at p. 865). If Iligan's cargo were discharged at that time, it would have been undamaged, but the carrier refused to take any steps at all.

The District Court thought it important that the Master didn't know the "actual defect" in the ship. This cannot be a relevant distinction for it rewards a carrier for its ignorance and is a dangerous message to give shipowners, especially today when ultra-large ships are sailing. In permitting the carrier to escape from its liability for wilfully sacrificing Iligan's property, the lower courts have acquiesced in such misconduct at the expense of petitioners and their decisions will thereby set a dangerous precedent which if not set aside will undoubtedly be followed with equally inequitable results.

5. Iligan's property has been taken by application of the United States Carriage of Goods by Sea Act (46 U.S.C. § 1304(5), as interpreted by the Court of Appeals. The

* The on-deck cargo on the SS JOHN WEYERHAEUSER arrived intact.

Court has granted a statutory limitation of liability to a carrier who wilfully damaged the cargo in its care and fraudulently induced the bill of lading. The constitutional question thus raised is whether the granting of a limitation of liability to such a person is "a denial of fundamental fairness shocking to the universal sense of justice."* If there has been such a denial then petitioners' right to substantive due process under Amendment V of the United States Constitution, has been violated.

That Amendment reads, in part:

> "No person shall be . . . deprived of . . . property, without due process of law; . . .".

There can be no question that the right to recover cargo damages from a tortfeasor either directly or through subrogation is a property right and that a statutory limit to the amount the tortfeasor must pay over is a "deprival" or a "taking" of petitioner's property.

The question before this Court then is whether the granting of the "package limitation" contained in 46 U.S.C. § 1304(5) to respondent Weyerhaeuser where it knew before the voyage that the ship was excessively leaking and failed to repair the leak or to notify the petitioner Iligan, was a denial of substantive due process.

The lower courts have held that COGSA provisions were intended to grant a limitation "in any event"** to respondant Weyerhaeuser. In so doing, they disregarded the purpose of the Act and the objectives which it sought to achieve. This construction allows for an arbitrary, capricious and unreasonable application of the limitation provisions of the Act and thereby thwarts its objective.

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* *Betts* v. *Brady* (1942) 316 U.S. 455, 462, 62 S. Ct. 1252, 86 L. Ed. 1595.

** 46 U.S.C. § 1304(5).

The purpose of 46 U.S.C. § 1304(5) as set out in *The Flying Clipper*, (S.D.N.Y. 1953) 116 F. Supp. 386, 388:

> ". . . was to prevent a stipulated value for cargo in in a lesser amount and to do away with the then current limits imposed by carriers, usually $100 or even a smaller sum."

The idea then was to increase the minimum allowable limitation and was passed for cargoes' benefit.

This purpose is not advanced by the interpretation placed upon § 1304(5) by the Court of Appeals. Rather, the opinion below allows respondent Weyerhaeuser to benefit from its own wrong. At the least it grants a fraudulent carrier benefits not meant for its use.

At a minimum it puts a premium on gross negligence and wilful disregard of a known unseaworthy vessel.

The interpretation which the lower courts have placed on COGSA has resulted in the transfer of property from one private person to another private person as a result of the latter's misrepresentation and/or gross negligence. This cannot be a "public purpose."

6. As held by this Court in *Herd & Co.* v. *Krawill Machinery Corp.* (1959) 359 U.S. 297, 79 S.C. 766 3 L. Ed. 2d 820, COGSA applies only to carriers. Throughout the Act, Congress refers only to "the carrier".

The bill of lading here (App. 35) expressly made a part of the July 11th contract (App. 1) contains a "demise clause" reading:

> "If the ship is not owned by or chartered by demise to the company designated herein (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect *only as a contract with the owner or demise charterer*, as

> the case may be, as principal, made through the agency of the Company designated herein [New York Navigation] which acts as agent only and shall be *under no personal liability whatsoever* in respect thereof". (emphasis supplied).

It then defines carrier as:

> ". . . the word 'Carrier' shall include the ship, her owner, master, operator, demise charterer, and *if bound hereby* the time charterer, and any substituted carrier, whether the owner, operator, charterer, or master shall be acting as carrier or bailee . . .". (App. 35) (emphasis supplied)

Since New York Navigation expressly disavowed any responsibilities under the bill of lading in the demise clause, it, therefore, excluded itself from the definition of carrier, for it was not "bound hereby".

Despite this agreement by the parties, the Circuit Court held that COGSA applied to New York Navigation and the "due diligence" requirement of COGSA § 1303(1) modified its express warranty of seaworthiness (App. 1)* as well as the warranty implied by law to every contract of affreightment. The Court also granted to New York Navigation the benefit of the package limitation contained in COGSA (§ 1304(5)).**

The Court below clearly distorted the terms ot a contract, of a type which is generally employed by maritime contractors throughout the world.

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* Exhibit Volume.

** As a further result of the ruling that COGSA applies to a non-carrier, the Court held the Uniform Commercial Code not applicable although the contract stated New York law was to apply. The Code, § 7-309, forbids any limitation by New York Navigation in this case since its freight rates were not based on value.

As a result the rights and duties of the parties previously predictable, have now become confused and unpredictable.

This Court should clarify whether or not COGSA applies only to the "carrier" or to anyone remotely connected to shipping.

7. The questions in this case, involving fraud, gross negligence, deviation, and the applicability of COGSA to non-carriers are of primary importance to the shipping fraternity.* Petitioners urge this Court to consider these questions since the decision below has created confusion and unpredictability in the maritime industry. The effect of the decision of the Court of Appeals further limits the right of subrogation. By excusing misrepresentation and knowledge of unseaworthiness, even a seaman's rights under the "Jones Act," 46 U.S.C. § 688 may be affected.

The unseaworthiness of a ship is the heart of a contract of carriage. It affects the lives of seamen and passengers as well as the property entrusted to the carrier.

The duties must be clarified. The Second Circuit has, in effect, told shipowners, even of 500,000 ton tankers, that knowledge of unseaworthiness or reckless disregard of cargo's safety does not void their contracts so they retain limitation provisions therein and in COGSA. Even a fundamental breach of contract, with fraudulent overtones, would be protected by COGSA.

Fraud is a moral evil as well as a *malum prohibitum.* To excuse it, as the Second Circuit has done in this case because the cargo was insured, is to reduce good and evil

* The Journal of Commerce (December 6, 1974) calls the decision below a "landmark", because it "will spare ocean carriers from endless litigation in instances where negligence causes loss of cargo".

to the status of operating costs. The lower Court excuses fraud and gross negligence because it is better for cargo insurers to pay.

Section 1303(8) of the COGSA reads, in part:

> "A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability".

Under the same section, such a clause is null and void. But by holding that it is "more practical and economical from the point of view of insurance" for cargo insurers to absorb cargo losses due to the carrier's gross negligence or wilful misconduct rather than to have the carrier's liability insurer respond, (507 F. 2d at p. 73) the Court of Appeals has granted the carrier a benefit it is barred from inserting in the contract.

We know that the Executive and Legislative branches of this Nation have sometimes been compelled for a larger good to take actions which are less than noble. This great Court has never done so. This Court will not reduce moral decisions to cost-benefit analysis.

The New York Times for January 27, 1975 said in an editorial that the "Second Circuit is widely viewed as second in importance to the United States Supreme Court because it is in practice, the Court of last appeal for many consequential cases." The maritime decisions of that Court command wide respect in the shipping industry and among other circuits.

Petitioner believes the Court of Appeals in deciding these "policy" questions, in conflict with decisions of this Court has, in effect, become the Court of last resort, because so few maritime matters are accepted by this Court.

If ceriorari be denied here, *The Willdomino, St. John's* and *Herd & Co.* are, in effect, overruled and shipowners will not spend the money to repair a ship where they will "in any event"* have a limitation of liability.

Petitioners respectfully request that in view of the broad statement of law propounded by the Court of Appeals, and the sweeping effect it intends that its decision will have, this Court settle the critical issues presented, so that the lower Federal Courts will be properly guided and the dangers inherent in the decision averted.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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* Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5).